No. 06-889

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

THE STATE OF OKLAHOMA,

Petitioner,

vs.

JAMES ALLEN CODDINGTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 5, 2007

QUESTIONS PRESENTED

1. Whether the capital sentencing jury in this case was prevented from considering, and giving effect to, relevant mitigating evidence in violation of the Eighth Amendment where: (a) Oklahoma's uniform instruction on impeachment of witness by former conviction was given to the jury; and (b) the jury was specifically instructed to consider as a mitigating circumstance that the defendant's family members had been, and were, incarcerated;

2. Whether a Fourteenth Amendment due process violation arose from exclusion during penalty phase of videotaped mitigation testimony of the defendant's emotionally-wrought mother where: (a) the same testimony depicted on the videotape was read verbatim to the jury; and (b) the lower court held it "cannot determine how the jury would have viewed [the mother's] testimony if it had actually seen her videotaped examination" but found that "the potential error would be of constitutional magnitude"; and

3. Whether the lower court's interpretation of *Lockett v. Ohio, 438 U.S. 586 (1978)*, violates this Court's holding in *Johnson v. Texas, 509 U.S. 350, 372 (1993)*, that a jury need only "be able to consider in some manner all of a defendant's relevant mitigating evidence," and need not "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant."

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No. 06-889

In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

STATE OF OKLAHOMA,

Petitioner,

vs.

JAMES ALLEN CODDINGTON

Respondent.

On Petition For Writ of Certiorari To The
Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Opinion of the Oklahoma Court of Criminal Appeals entered on August 16, 2006. See Coddington v. State, 142 P.3d 437 (Okl.Cr.2006).

STATEMENT OF THE CASE

Respondent is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, Case No. D-2003-887. Respondent was tried by a jury for the crime of First Degree Malice Aforethought Murder in violation of Okla. Stat. tit. 21, § 701.7 and Robbery

with a Dangerous Weapon, in violation of Okla. Stat. tit. 21, § 801, or in the alternative with Murder in the First Degree in violation of Okla. Stat. tit. 21, § 701.7 (B). (O.R. 6-7) The State filed a Bill of Particulars and two Amended Bills of Particulars. (O.R. 12, 497-498, 678-679) Additionally, the State filed a Notice of Evidence in Aggravation and two Amended Supplemental Statements Making More Definite and Certain Notice of Aggravation Evidence to be Offered in Support of the Bill of Particulars in Re: Punishment. (O.R. 94-95, 794-804, 1203-1204)

A jury trial was held from April 21through May 1, 2003. Mr. Coddington was found guilty of First Degree Malice Aforethought Murder and Robbery with a Dangerous Weapon. (O.R. 1255-56) Following the second-stage sentencing trial, the jury found the existence of two aggravating circumstances: that the murder was especially heinous, atrocious or cruel, and that Mr. Coddington had previously been convicted of a felony involving the use or threat of violence.[1] (O.R. 1257) The jury set punishment at death for the murder charge and life with the possibility of parole for the robbery charge. (O.R. 1260-61) After denying Mr. Coddington's Motion for New Trial, Judge Bass formally imposed judgment and sentence in accordance with the jury's verdict. (Sent. Tr. 7-9; O.R. 1447-49)

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[1] The State of Oklahoma also alleged that Mr. Coddington constituted a continuing threat to society and that the murder was committed to avoid arrest or prosecution. The trial court found there was insufficient evidence to support the avoid arrest aggravator and did not submit it to the jury (S.Tr. I 124) The jury did not find the existence of the continuing threat aggravator. (O.R. 1257)

Mr. Coddington perfected a direct appeal to the Oklahoma Court of Criminal Appeals c' ...nging both his conviction and sentence. On August 16, 2006, the Court issued a published opinion affirming Mr. Coddington's conviction, but remanding the case for resentencing. Coddington v. State, 142 P.3d 437 (Okl.Cr.2006). A Petition for Rehearing was denied on September 22, 2006 in an unpublished order. Petitioner now seeks review of the Court's opinion granting Respondent sentencing relief.

STATEMENT OF FACTS[2]

In 1972, James Coddington was born into a life of appalling abuse and severe deprivation brought on by generations of addiction and incarceration in the Coddington family. A mere six weeks after James Coddington's birth, his mother Gayla Hood, a lifelong methamphetamine addict, went to prison. (S.Tr. II 261-62) As a result, Mr. Coddington was left in the care of his father Bill Coddington, an abusive alcoholic. (S.Tr. II 268) Although Bill Coddington beat all of his children, he dealt the most severe abuse to James. (S.Tr. II 280) During second stage, Mr. Coddington's siblings specifically recalled events where Bill Coddington

[2] Respondent believes that a full recitation of the facts is necessary to fully address Petitioner's issues. The petition fails to fully set out the facts relevant to the Oklahoma Court of Criminal Appeals opinion. Petitioner refers to the reliance on evidence of a violent and poor background as the "dysfunctional background" approach and a "defense tactic." The facts developed at Mr. Coddington's trial were not so much a tactic, but his life history. This evidence is the sort of evidence recognized by this Court as essential in a capital murder sentencing proceeding. Wiggins v. Smith, 539 U.S. 510, 524 (2003). At trial, the State did not object to the inclusion of these facts in the mitigation instruction. (Tr.III 443)

threw James into a wall, kicked James out of his stroller, and beat James so severely he bled.[3] (S.Tr. II 176; S.Tr. III 435)

As a baby, daily life for James Coddington was pitiable. The Coddington family lived in a part of Oklahoma City known as Mulligan Flats.[4] (S.Tr. II 260 & 268) Their filthy home in the Flats had a dirt floor and broken windows, and the family members were forced to use the bathtub as a toilet. (S.Tr. I 135) The adults in the household were so consumed with their drug use that they openly "shot up" in front of the Coddington children. (S.Tr. III 433) As an infant, James Coddington crawled around on the floor littered with syringes and drugs. (S.Tr. III 434) James' half-sister, Kathy Johnson, recalled an incident where James picked up a small package of drugs from the floor and swallowed it. (S.Tr. III 434) Because Bill Coddington could not stand to hear James Coddington cry, he put alcohol in James' baby bottles.[5] (S.Tr. I 140; S.Tr. II 194 & 279)

When James was only fifteen months old, his older half-sister Kathy, who was fourteen at the time, ran away with him. Kathy told authorities she took James from her father's home because there were no diapers or

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[3]In addition to physically abusing James, Bill Coddington frequently verbally abused him, calling him such names as "son-of-a-bitch" and "bastard." (S.Tr. II 195)

[4]Described as a "slum" and a "ghetto," Mulligan Flats is an area plagued by drug and alcohol problems. (S.Tr. II 190)

[5]Tommy Coddington, James Coddington's half-brother, testified that he and James' older brothers also gave James alcohol because they "thought it was funny the way he would act and he would get a buzz." (S.Tr. II 176)

clothes in the home and he was not receiving adequate care. (S.Tr. II 359-60; Def. Ex. 9) Records from that time indicate that James Coddington was the size of an eight or nine month old and he appeared undernourished. (Def. Ex. 9) James was temporarily placed into foster care. (Def. Ex. 9)

Although there never appeared to be a shortage of drugs or alcohol in the Coddington home, food was often scarce. Even though Bill Coddington received welfare assistance to meet the needs of his children, he chose to spend the money on booze. (S.Tr. II 268) As a result, the Coddington children were forced to eat from dumpsters behind fast-food restaurants because there was no food in the house. (S.Tr. I 135; S.Tr. II 270)

Not only did the Coddington children lack proper nutrition while living with Bill Coddington, they also suffered from poor hygiene. James Coddington was forced to wear filthy clothing. Not surprisingly he often had strong body odor. When James Coddington visited his mother in prison, she noticed he was infested with head lice. (S.Tr. II 270) One of Ms. Hood's case managers bought the soap to get rid of the lice. (S.Tr. II 270)

Gayla Hood was released from prison when James Coddington was eight years old. (S.Tr. II 263) Upon release, Ms. Hood discovered that Bill Coddington had abandoned his children and that James had been placed into the psychiatric unit of Oklahoma Children's Memorial Hospital for behavioral problems. (S.Tr. II 268; Def. Ex. 9) After spending over six

months in the facility, James Coddington was released to the custody of his mother. (Def. Ex. 9)

After Mr. Coddington's release from the psychiatric unit, he began getting into trouble. His older brothers introduced him to drugs when he was very young and James Coddington eventually developed into a full-blown crack cocaine addict.[6] (Tr. V 81; S.Tr. II 268) Mr. Coddington's family soon discovered that he became a "different person" when he was under the influence of drugs. (S.Tr. II 267)

After pleading guilty to multiple counts of burglary and unauthorized use of a motor vehicle, Mr. Coddington went to prison at the age of nineteen. (St. Ex. 79 & 80; Tr. VI 39) Upon his release from prison, Mr. Coddington attempted to turn his life around and break the powerful addiction that had previously ruled his life. He fell in love with a woman named Michelle Martin; they became engaged. (Tr. III 188; Tr. V 41) Ms. Martin and Mr. Coddington lived together with her two young children. Mr. Coddington had an extremely good relationship with her children and he "took care of the kids as they were his." (Tr. V 41)

In addition to the improvements in his personal life, Mr. Coddington became gainfully employed at a Honda salvage yard located in Spencer. (Tr. III 187) For over two years, James Coddington worked regularly at the

[6] Tommy Coddington testified he abused drugs around James and taught him how to shoot up because he "was afraid he would use too much or something and OD." (S.Tr. II 174) Gayla Hood also admitted she set a poor example for James because he was fully aware of her drug abuse and that she dealt drugs. (S.Tr. II 267)

salvage yard, earning as much as $500 a week. (Tr. III 188; Tr. VI 52) During Mr. Coddington's employment at the salvage yard, he became acquainted with Albert Hale, the seventy-three year old decedent in this case. (Tr. III 196) James Coddington and Albert Hale often shared lunches and eventually the two men became good friends. Mr. Coddington became so fond of Mr. Hale that he bought Mr. Hale a puppy to keep him company, as he lived alone. (Tr. V 46)

Despite Mr. Coddington's efforts to turn his life around, he relapsed back into his destructive addiction. About a year and a half into their relationship, Michelle Martin noticed that Mr. Coddington's behavior changed. He admitted to her that he was again using crack-cocaine. (Tr. V 42-43) At Ms. Martin's encouragement, Mr. Coddington sought help for his addiction. (Tr. V 43) In December of 1996, Mr. Coddington entered into drug treatment for thirty days at Drug Recovery, Incorporated. (Def. Ex. 11 & 11A; S.Tr. I 125-28)

After his release from treatment at the end of January, 1997, Mr. Coddington's attempts to stay off drugs failed. His relationship with Michelle Martin disintegrated. She and her children moved out of the home. (Tr. V 44) By the beginning of March, 1997, Mr. Coddington was completely consumed by his crack-cocaine addiction. Mr. Coddington estimated he spent approximately $1000 per day in order to support his cocaine habit. (St. Ex. 88; St. Ex. 89 p. 4)

By March 5, 1997, Mr. Coddington was desperate for money to feed his habit. He robbed a 7-11 convenience store on the afternoon of the 5th of March. (Tr. V 17; St. Ex. 88) Seeing that he still did not have enough money to satisfy his need for crack, Mr. Coddington went to the home of Albert Hale with the intention of borrowing $50. (Tr. VI 45 & 59)

Mr. Coddington arrived at Mr. Hale's home located in Choctaw around 5 p.m. on March 5th. (Tr. VI 46) Mr. Coddington parked the car he was driving in a position where it was easily seen by the neighbors. (Tr. VI 46) He did not have a weapon with him. (Tr. VI 48) Inside Mr. Hale's home, the two men sat and visited for a couple of hours. At some point, Mr. Coddington used crack-cocaine in Mr. Hale's bathroom. (Tr. VI 47) After using the crack, Mr. Coddington asked Mr. Hale for money. Mr. Hale refused to give Mr. Coddington any money, urged him to get some help with his drug problem, and asked him to leave. (Tr. VI 48) As Mr. Coddington was exiting Mr. Hale's house through the kitchen, he noticed a hammer on top of the dishwasher. According to Mr. Coddington, after Mr. Hale attempted to push him out of the kitchen, Mr. Coddington grabbed the hammer, "and the next thing I knew he was laying on the floor and I had hit him with it." (Tr. VI 48; St. Ex. 88; St. Ex. 89 p. 15) After hitting Mr. Hale in the head with the hammer three or four times, Mr. Coddington took $520 from his pocket. He took nothing else from Mr. Hale's house. Mr.

Coddington thought that Mr. Hale was dead. (St. Ex. 88; St. Ex. 89 p. 15) After washing his hands, Mr. Coddington left.

Later that night, Ron Hale, Al Hale's son, became concerned when his father did not answer the telephone. (Tr. III 45) Ron Hale went to his father's home and discovered blood all over the kitchen. (Tr. III 47) Eventually, Ron Hale found Al Hale lying in his bed, undressed, and covered with blood and feces. (Tr. III 48) Al Hale appeared to be lapsing in and out of consciousness. (Tr. III 80) Believing his father had fallen and injured himself, Ron Hale called 911 and informed them of such. (Tr. III 48) After the arrival of emergency personnel around 8:45 p.m., it was deduced that Al Hale had been attacked and had sustained serious head injuries. (Tr. III 75-78)

Emergency medical personnel transported Al Hale to Midwest City Hospital and eventually, to Presbyterian Hospital. (Tr. III 51-52) Al Hale died approximately twenty-four hours later. (Tr. III 52) An autopsy performed on March 7, 1997, revealed that head trauma was the cause of Mr. Hale's death. (Tr. IV 23) Dr. Fred Jordan testified Mr. Hale sustained at least three distinct blows to the left side of his head. (Tr. IV 31)

During the forty-eight hours following Mr. Coddington's attack on Mr. Hale, Mr. Coddington continued his crack-cocaine fueled spree. He robbed five more convenience stores in order to obtain more money for drugs. (Tr. V 18-20; Def. Ex. 21, 21A, 21B, 21C, 21D, 21E) Strangely, Mr. Coddington

committed these robberies while being followed by Detective Wes Weaver of the Choctaw Police Department.[7] (St. Ex. 89 p. 32)

On the morning of March 7, 1997, Robbery Detective Robert Smart with the robbery unit of the Oklahoma City Police Department arrested Mr. Coddington pursuant to an arrest warrant outside of his apartment on south May Avenue in Oklahoma City. (Tr. III 212-13) Detective Smart noticed that Mr. Coddington appeared to be in an agitated state. Mr. Coddington told Detective Smart that he had been on a cocaine binge. (Tr. III 232-35) As Mr. Coddington was being transported from the scene of the arrest to the Oklahoma City Police Department, he attempted to choke himself by wrapping a seat belt around his neck. (Tr. V 28) He also expressed his desire to die on several occasions. (Tr. III 216; St. Ex. 89 p. 12) After arriving at the police station, Mr. Coddington confessed to the robberies and to striking Mr. Hale in the head with a hammer. (St. Ex. 88; St. Ex. 89) Throughout his confession, he expressed remorse and sadness for what he had done to Mr. Hale. (St. Ex. 88; St. Ex. 89 p. 12-14)

REASONS FOR DENYING THE WRIT

The Petitioner has failed to raise issues that constitute "compelling reasons" for granting the writ in this case. See Rule 10, *Rules of the Supreme Court.* Petitioner submits four reasons why the writ should be granted in this case. First, Petitioner claims that the state appellate court's

[7]When Mr. Coddington asked Det. Weaver why the police did not stop him during the robberies, Det. Weaver replied, "Well, you know how it is, you put the slip on us." (St. Ex. 89 p. 32)

decision directly conflicts with Romano v. Oklahoma, 512 U.S. 1 (1994); Saffle v. Parks, 494 U.S. 484 (1990) and Boyde v. California, 494 U.S. 370 (1990).

Second, Petitioner claims that the court's holding regarding the improper impeachment instruction "needlessly undermines the prosecution's ability to present a case in support of the death penalty where, as here, a parade of family members with prior felony convictions testify on a defendant's behalf to a series of highly questionable, distant events in a quest to secure a non-capital sentence." Third, Petitioner states that the issues raised in the petition are capable of repetition because almost all capital appeals involve Fourteenth Amendment due process violations stemming from evidentiary errors. Finally, Petitioner submits that the state appellate court's opinion constitutes an overbroad interpretation of Lockett v. Ohio, and that it reflect tension between the Lockett, Eddings v. Oklahoma, 455 U.S. 104 (1982) and Skipper v. South Carolina, 476 U.S. 1 (1986) line of cases with Johnson v. Texas,[8] and Graham v. Collins.[9]

Petitioner's first contention regarding the application of Romano, Saffle, and Boyde is discussed fully below in Respondent's discussion of the questions presented. However, it is worth pointing out initially that Romano, Saffle, and Boyde are all apart of this Court's Eighth Amendment jurisprudence. The issue decided by the Oklahoma Court of Criminal Appeals is a Fourteenth Amendment due process error. As such, Petitioner's petition

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[8] 509 U.S. 350 (1993)
[9] 506 U.S. 461 (1993)

presents a theoretical argument rather than an issue ripe for decision by this Court.

Petitioner's second reason for granting the writ--that the Oklahoma Court of Criminal Appeals' holding regarding the impeachment instruction will make it difficult for the State of Oklahoma to adequately present a case for death --completely overstates the holding. Oklahoma's uniform jury instruction in question states:

> Evidence has been presented that [Name of Witness] has heretofore been convicted of (a criminal offense)/(criminal offenses). This evidence is called impeachment evidence, and it is offered to show that the witness's testimony is not believable or truthful. If you find that (this conviction)/(these convictions) occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of that witness. You may not consider this impeachment evidence as proof of innocence or guilt of the defendant. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the witness, if at all.

Oklahoma Uniform Jury Instructions, OUJI-Cr 2d 9-22. The court did not hold that the State could never impeach penalty phase witnesses with prior convictions, or that some sort of instruction may be crafted to be given in the penalty phase. The court only held that under the circumstances of this case, where the fact of the Coddington family's extensive criminal background was an important component of the mitigation case, the instruction should not have been given. Coddington, 142 P.3d at 460-461. Such a holding hardly places a constraint on the State of Oklahoma in presenting evidence in support of its death case.

Petitioner's third ground for granting the writ is that the lower court's impermissible standard for establishing a Fourteenth Amendment violation has the potential to affect a great number of capital cases. However, Petitioner has failed to illustrate that the state appellate court applied an impermissible standard. In fact, a close reading of the case shows that the Court's decision to reverse Mr. Conddington's sentence is based on the fact that the State failed to prove that the constitutional error was not harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). Coddington, 142 P.3d at 460.

As for the fourth reason for granting the writ, Respondent submits that there is no conflict between Lockett and its progeny and Johnson and Graham. Even if such a conflict existed, the matter was not raised before the state appellate court as it is raised here. As such, it should not be reviewed by this Court.

I. THE COURT'S HOLDING IN THIS CASE DOES NOT CONFLICT WITH THE HOLDINGS IN ROMANO, SAFFLE, AND BOYDE, AS THE COURT DID NOT REVERSE ON AN EIGHTH AMENDMENT GROUND.

The first argument presented by the Petitioner relates to the finding by the Oklahoma Court of Criminal Appeals that the trial court's exclusion of the videotaped testimony (including cross-examination by the State of Oklahoma) of Mr. Coddington's mother constituted a mechanistic application of the rules of evidence to defeat the ends of justice in violation of the Fourteenth Amendment, Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038,

1049, 35 L.Ed.2d 297 (1973) and Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151, 60 L.Ed.2d 738 (1979). Petitioner fails to fully apprise the Court of all the facts surrounding the making of and the exclusion of the videotaped testimony. These facts are essential in evaluating the state appellate court's holding.

On May 2, 2000, almost three years before the trial commenced in this case, defense counsel filed an Application to Take Testimony of Out of State Witness. (O.R. 743-45) The application sought an Order from the court to allow defense counsel to take the videotaped statement of Gayla Hood, Mr. Coddington's mother, to preserve her testimony for purposes of second stage. Ms. Hood, now deceased, was at that time housed at the Federal Medical Center Penitentiary at Carswell Air Force Base in Fort Worth, Texas. She suffered from numerous heart problems and, according to her treating physician, could die at any time. (O.R. 746) Defense counsel made this application pursuant to Okla. Stat. tit. 22, § 781 et seq. which provides the procedure for a commission to take testimony outside of the state.

A hearing was held May 4, 2000, wherein the defense and the State agreed to submit interrogatories; both parties also agreed to videotape and make a transcript of the interrogatories. (5/4/00 Mot. Tr. 5) On the date of the hearing, the State was represented by Lou Keel. The State's only reservation to the procedure was as follows:

> The only disagreement, sir, we have got [sic] pertaining to the manner in which the testimony from this witness would be given to the jury at trial and whether follow-up questions to the interrogatories that are proposed will be appropriate. I think that those are things that can be taken up before Your Honor at a later date to address the compliance with the evidence code that the questions and answers may entail. So I think that is something we can take up later on. (5/4/00 Mot. Tr. 5).

Defense counsel filed its intended interrogatories for Ms. Hood on May 12, 2000. (O.R. 748-52).

On June 8, 2000, Defense counsel Tamra Spradlin and Assistant District Attorney Marnie Hill went to the correctional facility in Fort Worth and took the video-taped statement of Ms. Hood.[10] (S.Tr. I 76; Def. Ex. 25A) Ms. Hood was sworn in by Judge Bass over the telephone. After Ms. Spradlin questioned Ms. Hood, Ms. Hill followed up with numerous cross-examination questions. (Def. Ex. 25 p. 19-22) Some time after this event, Mr. Keel and Ms. Hill were replaced by Assistant District Attorneys Fern Smith and Christy Reid.

Due to Ms. Hood's critical condition at the time of Mr. Coddington's trial, defense counsel intended to introduce her statement through the videotape made in June of 2000. On April 24, 2003, three days after Mr. Coddington's trial started, the State filed a Motion in Limine to prohibit playing the videotape because the deposition statute did not specifically

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[10] Def. Exhibit 25, the entire transcription of Ms. Hood's statement, Def. Ex. 25A, the videotape of Ms. Hood's statement, and Def. Ex. 25B, the redacted version of Ms. Hood's videotaped statement were not admitted into evidence; however, they were made part of the record in this case for appellate review. (S.Tr. II 255)

provide for videotaped dispositions. (O.R. 1235-36) The State also argued that some of Ms. Hood's responses contained inadmissible hearsay.

The Oklahoma Court of Criminal Appeals found that the trial court's decision to exclude the videotape itself violated Mr. Coddington's fundamental right to due process under the Fourteenth Amendment because it constituted a mechanistic application of an evidentiary rule. In so holding, the state appellate court recognized the preference for live testimony. Coddington, 142 P.3d at 458-459. Additionally, the Court found that the State of Oklahoma had not met its burden of proving the error harmless beyond a reasonable doubt. Coddington, 142 P.3d at 460 ("We cannot determine how the jury would have viewed Hood's testimony if it had actually seen her videotaped examination. However, the potential error would be of constitutional magnitude. The only proper remedy is to remand for a new sentencing hearing...").

Petitioner attempts to shift this Court's attention from the Fourteenth Amendment issue raised by Respondent and ruled on by the state appellate court, to what Petitioner refers to as "the Eighth Amendment core" of the decision, in order to argue that the state court improperly broadened a capital defendant's right to present mitigating evidence under Lockett v. Ohio, 438 U.S. 586 (1978). However, a careful reading of the opinion itself shows that the Court's holding does no such thing. In evaluating the excluded videotape, the Court considered the videotape in its context,

which is the taped testimony of a mitigation witness in a capital case. Coddington, 142 P.3d at 460. The Court's reference to Lockett, Eddings v. Oklahoma, 455 U.S. 104 (1982) and Skipper v. South Carolina, 476 U.S. 1 (1986) served only that end. The Court did not rely on Lockett but acknowledged Gayla Hood's testimony as the type of evidence contemplated by Lockett. What the Petitioner refers to as the "Eighth Amendment core" of the decision constitutes nothing more than dicta. Therefore, the Petitioner's argument, premised on the assertion that there is not an Eighth Amendment right to have a capital jury consider sympathy[11], and therefore no Fourteenth Amendment violation can occur as a result of the exclusion of evidence invoking sympathy, misses the point of the Respondent's argument and the state appellate court's holding. The issue is not how the jury was allowed to consider the evidence, but that the trial court mechanistically applied a statutory rule in a manner that prevented the defendant from putting on part of his defense with the best evidence available.

Petitioner argues that because the testimony was read, the trial court's ruling did not affect what was presented, but rather how it was

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[11] Oklahoma Uniform Jury Instruction-Criminal 2d. 4-78 states in part: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." As sympathy is an appropriate consideration for Oklahoma jurors, Petitioner had a right to present such evidence to the jury in his mitigation case.

presented. However, the Oklahoma Court of Criminal Appeals' opinion specifically addresses the issue in terms of what the jury was prohibited from considering by excluding the videotape—namely, Ms. Hood's demeanor and credibility. By excluding the videotape, it was much easier for the prosecution to discredit Gayla Hood because the jury was not able to view that aspect of her testimony. The issue here is not whether the jury was able to give adequate consideration to Gayla Hood's statements under the Eighth Amendment, but rather whether the trial court's exclusion of the videotape was fair.

The compelling aspect of the video is not just in the words spoken by Ms. Hood, but her emotional demeanor in regard to her son. The video presented the image of a mother who loved her son and who regretted her role in his painful life. His life meant something to her even though their relationship throughout much of his life was limited to letters and visitation days at various prisons. There was a tactical reason the prosecution wanted the video excluded; it was the single most compelling piece of mitigation evidence the defense had to present to the jury.[12] Excluding the videotape made the State's death case a lot easier.

Petitioner also challenges the Oklahoma Court of Criminal Appeals harmless error analysis alleging that the appellate court "merely speculated its way to a Fourteenth Amendment due process violation." The court found

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[12] Respondent regrets that this Court cannot view the videotape as it is difficult to fully appreciate the Court of Criminal Appeals' holding on this issue without it.

that the prejudice suffered by Mr. Coddington was that the jury was needlessly prevented from adequately judging Ms. Hood's demeanor and credibility. Additionally, the Court made a determination that the State had failed to prove that the constitutional issue was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). It was not speculation but rather a finding that the State could not meet its burden to show the error was harmless.

Petitioner's argument that the appellate court's holding on the impeachment instruction violated Boyde is premised on Petitioner's belief that Respondent made no more of a showing than there was a "possibility" that the jurors could have read the impeachment instruction as inhibiting their ability to fully consider the mitigating evidence. However, again, the Court's holding reflects that it found that the State had not proven that the error was harmless beyond a reasonable doubt under Chapman. Coddington, 142 P.3d at 461.

II. NOTHING IN THE OKLAHOMA COURT OF CRIMINAL APPEAL'S INTERPRETATION OR APPLICATION OF LOCKETT V. OHIO IS CONTRARY TO THIS COURT'S REQUIREMENT THAT CAPITAL SENTENCING DECISIONS BE RELIABLE, ACCURATE AND NONARBITRARY.

Petitioner's assertion that "The Oklahoma Court of Criminal Appeal's decision on the instructional issue is inconsistent with the Eighth Amendment's requirements of reliability, accuracy and nonarbitrariness in capital sentencing" is baseless. Petitioner makes that assertion based on Petitioner's belief that the state appellate court held that the State may

never impeach a second stage witness. However, the OCCA's opinion does not hold the State may not impeach mitigation witnesses with prior convictions under any circumstances. The court only held that the instruction that was given in the second stage of Mr. Coddington's trial -- an instruction the Court had previously held was inapplicable under these circumstances[13] -- was improper under the circumstances. Nothing in the Court's opinion forecloses the possibility that, should prior convictions be admitted for the sole purpose of impeachment, an instruction that properly explains the relationship between mitigating background evidence and impeachment evidence would be appropriate.

Further, Petitioner's argument that the court's holding undermines the reliability and accuracy requirements of the Eighth Amendment is shaded by the State's obvious disagreement with the state appellate court's holding. It is the giving of such an instruction that re-characterized the evidence offered by the defendant from mitigation evidence, to impeachment evidence offered by the State, which undermines the reliability of the sentencing proceedings.

Additionally, in Ground II Petitioner re-urges the argument that the OCCA's holding regarding the videotape conflicts with Saffle. However, as pointed out above, the holding on the exclusion of the videotape was grounded in the Fourteenth Amendment Due Process Clause and not the

[13] Williams v. State, 22 P.3d702, 726 (Okl.Cr.2001).

Eighth Amendment. As such, the holding couldn't possibly erode this Court's Eighth Amendment jurisprudence. As no conflict exists, this Court should not grant the writ on this ground.

CONCLUSION

Because Petitioner's claims are neither supported by the Oklahoma Court of Criminal Appeals' opinion in this case nor relevant case law from this Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 06-889

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

THE STATE OF OKLAHOMA,

Petitioner,

vs.

JAMES ALLEN CODDINGTON,

Respondent.

CERTIFICATE OF SERVICE

I, Andrea Digilio Miller, member of the bar of this Court, do hereby certify that I have served a copy of the Brief in Opposition to Writ of Certiorari on counsel for the Petitioner, State of Oklahoma, by depositing the same in the U.S. Mail, postage prepaid, to Seth Branham, Assistant Attorney General, Office of the Attorney General, 313 N.E. 21st, Oklahoma City, Oklahoma 73105, this 6th day of March, 2007. All parties required to be served have been served.

Andrea Digilio Miller

ANDREA DIGILIO MILLER